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No. 91-1001

In the Supreme Court of the United States

OCTOBER TERM, 1991

NYE COUNTY, NEVADA, AND BERNIE C. MERLINO
NYE COUNTY ASSESSOR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

DAVID ENGLISH CARMACK
JOHN J. MC CARTHY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether a private contractor that lacks a beneficial personal interest in federal property that it operates and maintains under a service contract with the United States is subject to a state *ad valorem* property tax with respect to that property.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11-21) is reported at 938 F.2d 1040. The opinion of the district court (Pet. App. 1-7) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22) was entered on July 15, 1991. The petition for rehearing was denied on September 18, 1991. Pet. App. 23. The petition for a writ of certiorari was filed on December 16, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Tolicha Peak Electronic Combat Range and the Tonopah Electronic Combat Range are owned by the United States. At these facilities located in Nye County, Nevada, the United States has electronic equipment that simulates Soviet defense systems. The Air Force uses this equipment to devise battle scenarios and simulated combat environments to stage training exercises for its pilots. Since 1980, the Air Force has contracted with Arcata Associates, Inc. (Arcata) to operate and maintain this equipment. Arcata has neither a property interest in the equipment nor a right to use the equipment for its own account or business. Its only access to the equipment is at the time and place and in the manner directed by the United States.[1] Arcata can not exclude Air Force personnel or other contractors from operating or maintaining the equipment. The United States can terminate its relationship with Arcata at will. Pursuant to the contract, the United States reimburses Arcata for all costs incurred in operating and maintaining the electronic equipment and pays Arcata a fixed base fee and a performance award fee for its services. Those fees are unrelated to the value of the equipment that Arcata services. Pet. App. 2-4, 12.

Claiming that Arcata has a taxable interest in this federal equipment (Pet. App. 12), petitioners assessed a personal property tax against Arcata under Nev. Rev. Stat. Ann. § 361.159 (Michie 1991). That statute provides in pertinent part (*ibid.*):

> Personal property exempt from taxation which is leased, loaned or otherwise made available to and used by a natural person, association or corporation in

[1] Arcata spends approximately 75% of its time under the contract in maintaining the equipment and 25% of its time in operating the equipment (Pet. 3).

> connection with a business conducted for profit is subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of the property.

For tax years 1983-1984 through 1988-1989, petitioners assessed taxes against Arcata under this statute in the total amount of $127,414.03 (Pet. App. 4, 9, 13). [2] Arcata paid the taxes under protest and was reimbursed by the United States as required by the contract (*id.* at 13).

2. The United States filed this suit to recover the taxes, to obtain a declaratory judgment that assessment of the tax is unconstitutional and to enjoin further assessments (Pet. App. 1, 11, 13). The district court held the tax unconstitutional as applied because Arcata has no beneficial personal use of the federal property that it operates and maintains, and the incidence of the tax is therefore solely upon property owned by the United States (*id.* at 1-9).

The court of appeals affirmed, with one judge dissenting (Pet. App. 11-21). The court stated (*id.* at 15-16 (citation omitted)):

> * * * the Nevada statute under which Nye County seeks to impose its tax against Arcata taxed the user "in the same amount and to the same extent as though the lessee or user were the owner of the property." * * * Here, the property belongs to the United States. Arcata has no leasehold interest in it, but merely has the privilege, terminable at the will of the government, to use the property at the time and place and in the manner directed by the United States. Nye

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[2] Petitioners claim that the tax is based upon Arcata's declaration of the value of the taxed property and Arcata's declaration of its percentage of use of the property (Pet. 4). The evidence revealed, however, that Arcata was taxed at the full value of the federal property, as though Arcata was the owner of the property, even though Arcata indicated it had "0 beneficial use" in the property (Pltf.'s Trial Exh. 1).

> County makes no attempt to segregate and tax any possessory interest Arcata may have in the property, or Arcata's beneficial use of the property. Nye County simply taxes Arcata as if it were the owner of the property. The tax effectively lays "an *ad valorem* general property tax on property owned by the United States." [*United States* v.] *Colorado*, 627 F.2d [217,] 221 [(10th Cir. 1980), aff'd *sub nom. Jefferson County*, v. *United States*, 450 U.S. 901 (1981)].

The court found that petitioners had failed to identify and segregate any beneficial use of Arcata on which to impose the tax. The court also found that the taxing statute improperly required taxation of the full value of the property to Arcata without giving account to the limited beneficial use (if any) that Arcata may have had (Pet. App. 16). The court accordingly determined that the tax, as applied, is an *ad valorem* tax on property of the United States and is therefore unconstitutional (*ibid.*).

The dissent recognized (Pet. App. 18) that the court's decision finds support in *United States* v. *Colorado*, 627 F.2d 217 (10th Cir. 1980), aff'd *sub nom. Jefferson County* v. *United States*, 450 U.S. 901 (1981), and *United States* v. *Hawkins County*, 859 F.2d 20 (6th Cir. 1988), cert. denied, 490 U.S. 1005 (1989). The dissenting judge believed, however, that this Court's decision in *United States* v. *New Mexico*, 455 U.S. 720 (1982), permits application of the State's tax to a federal contractor without identifying and segregating the contractor's beneficial personal use (Pet. App. 19-21).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. It is now settled law that a State may tax a private person's leasehold or possessory interest in federal property so long as the tax is limited to the contractor's

beneficial personal use of that property. *United States* v. *New Mexico*, 455 U.S. 720, 741 n.14 (1982); *United States* v. *Colorado*, 627 F.2d 217 (10th Cir. 1980), aff'd *sub nom. Jefferson County* v. *United States*, 450 U.S. 901 (1981); *United States* v. *County of Fresno*, 429 U.S. 452, 462, 466 n.15 (1977). When a tax fails to identify, segregate and evaluate the private party's interest in property owned by the federal government, and is based on a value that exceeds the private party's interest in that property, however, the tax is on the federal government's property and violates the United States' immunity from local taxation. *United States* v. *County of Fresno*, 429 U.S. at 462-463 n.10.

In this case, the courts below correctly found (Pet. App. 16) that petitioners did not segregate any beneficial use that Arcata itself may have had in the property but instead taxed Arcata as if it were the sole owner of the property. The dissent does not dispute this finding and, contrary to petitioners' contention (Pet. 4-5), the record amply supports the courts' conclusion. See note 2, *supra*. Petitioners' continuing dispute with the concurrent factual conclusions of the lower courts does not merit further review. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

Moreover, the record demonstrates that Arcata has no beneficial personal use of the federal property it has been hired to maintain and operate under the direction of the Air Force. Arcata has no license, permit or right to use the property for its own private purposes. Instead, Arcata is paid a fee for performing services called for by its contract—a fee unrelated to the value of the federal property involved. Arcata can not exclude the Air Force from access to the equipment and its contract may be terminated without notice (Pet. App. 2-4, 6, 12).[3] While the

[3] Indeed, the evidence established that Air Force personnel and other government agencies operated this same equipment (RT 48, 55,

evidence thus reflects that Arcata lacks *any* beneficial personal use in the property that might be reached by a state taxing statute, the Nevada statute sought to tax not only Arcata's interest but instead taxed the full value of the property. As the court of appeals held (*id.* at 16), the tax thus improperly fell upon the federal government's property.

The decision in this case represents a direct application of this Court's decisions in *United States* v. *County of Fresno*, *supra*, and *Jefferson County* v. *United States*, *supra*, which hold that an annual *ad valorem* property tax imposed upon a user of federal property must bear some reasonable relationship to the value of the user's "beneficial personal use" of the property. *County of Fresno* involved federal Forestry Service employees who were required by the United States to live in rental housing in national forests in California. This Court upheld California's annual *ad valorem* tax on the employees' possessory interest in the housing, based upon the estimated fair rental value of the housing. The Court held that this tax was based upon the employees' possessory interest in the housing and not upon the federal property or on a federal function. The Court warned, however, that (429 U.S. at 466 n.15):

> [a]n attempt by California to impose a use tax on a Forest Service employee for his fire ax—which he used *only* in performing his job—or on a fire tower inhabited by such employee in the daytime and solely in order to perform his job would present a different question. The employee does not put either the ax or the tower to "beneficial personal use," and it is not part of his "profit" or his "salary." *United States* v. *City of Detroit*, [355 U.S. 466,] 471 [(1958)].

56, 84, 126, 159, 167). "RT" refers to pages in the reporter's trial transcript.

The Court thus held in *County of Fresno* that only a "beneficial personal use"[4] in leasing or using federal property could be taxed and that a person's use in his job of federal property (such as a fire ax or a fire tower) could not be taxed. 429 U.S. at 466. In *Jefferson County*, this Court affirmed the Tenth Circuit's decision in *United States* v. *Colorado*, holding that a Colorado *ad valorem* property tax was unconstitutionally imposed upon a federal contractor on account of its management of a nuclear plant owned by the United States pursuant to the contract with the United States when, as here, the tax was based upon the full value of the nuclear facility (627 F.2d at 219-221). See 450 U.S. at 901. The Tenth Circuit noted in its decision that the contractor had no leasehold interest, permit or license in the property in question, and that any use the contractor made of the federal property was strictly delineated by contract. 627 F.2d at 219. The court concluded that the contractor's use of the federal property was so limited by its contract with the United States that the value of any beneficial interest or use which the contractor might have had in the property was necessarily less than the full market value of the property. *Ibid.* The tax thus necessarily, at least in part, was on property of the United States. *Ibid.*

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[4] The term "beneficial personal use" was first used in this context by this Court in *United States* v. *County of Allegheny*, 322 U.S. 174, 187-188 (1944). In that case, this Court, while holding certain federal property to be immune from Pennsylvania's *ad valorem* real property tax in the hands of a federal contractor because the state made no effort to segregate the contractor's interest, recognized that the contractor's "personal advantages from the relationship by way of salary, profit, or beneficial personal use of the property may be taxed" (322 U.S. at 188). In *United States* v. *City of Detroit*, 355 U.S. 466 (1958), the Court upheld imposition of a tax on a lessee's leasehold interest in federal property, stating that "[h]ere we have a tax which is imposed on a party using tax-exempt property for its own 'beneficial personal use' and 'advantage'." 355 U.S. at 472.

Arcata's use of the federal equipment in this case is much like the use of the fire ax or tower mentioned in *County of Fresno*. See 429 U.S. at 466 n.15. Moreover, as in *Jefferson County*, the contractual restrictions placed on Arcata's use of the equipment demonstrate that, if Arcata has any beneficial personal use in the property at all, the value of that beneficial use is necessarily less than the total value of the property. In this situation, a tax computed on the full value of the property necessarily falls at least in part upon property of the United States and is therefore unconstitutional. See *United States* v. *Hawkins County*, 859 F.2d 20, 23 (6th Cir. 1988), cert. denied, 490 U.S. 1005 (1989).

The dissent errs in concluding (Pet. App. 16-21) that this case is essentially the same as *United States* v. *New Mexico*, in which this Court upheld imposition of a state excise tax on a federal contractor's gross receipts and a state compensating use tax on property for which no state sales tax had been paid.[5] In *New Mexico*, the Court concluded that a use tax is valid only to the extent that it reaches the contractor's interest (if any) in federal property and pointed out that no suggestion had been raised in that case that the contractors were being taxed beyond the value of their use. 455 U.S. at 741 n.14. By contrast, petitioners have not limited the tax in this case to reach only the value of Arcata's use, but have instead taxed Arcata as if it were the sole owner of the property. The decision in *New Mexico* does not sanction a tax that is not limited to the value of the contractor's use.

2. Contrary to petitioners' assertion (Pet. 8-15), the decision in this case is also consistent with this Court's

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[5] The dissent mischaracterizes the federal government's argument as depending upon an assertion that Arcata is an agent of the United States (Pet. App. 17-19). As the majority of the court of appeals pointed out, the United States conceded that Arcata is not an agent or instrumentality of the government (*id.* at 12 n.1).

decisions in *United States* v. *City of Detroit*, 355 U.S. 466 (1958), *City of Detroit* v. *Murray Corp.*, 355 U.S. 489 (1958), *United States* v. *Township of Muskegon*, 355 U.S. 484 (1958), and *United States* v. *Boyd*, 378 U.S. 39 (1964), and with the decision of the Nevada Supreme Court in *United States* v. *State ex rel. Beko*, 493 P.2d 1324 (1972).

a. In *United States* v. *City of Detroit*, 355 U.S. at 472-474, *United States* v. *Township of Muskegon*, 355 U.S. at 486-487, and *City of Detroit* v. *Murray Corp.*, 355 U.S. at 492-495, the Court sustained imposition of an *ad valorem* property tax and personal property tax imposed upon a contractor's interest in federal property used by the contractor in its manufacturing business. In sustaining these taxes, the Court was careful to point out that the taxes reached only the contractor's interest in the property and did not reach any interest of the federal government. See, *e.g.*, *id.* at 494.

In contrast to the situation in those three cases, petitioners failed in this case to segregate and tax only the interest (if any) that Arcata has in use of the federal property. Moreover, the courts below found that, in fact, Arcata has *no* beneficial use of the taxed property and has no estate, leasehold, license, permit or any other rights, title or interest in the federal property (Pet. App. 2-3, 16). Thus, while the contractors in the above three decisions had leasehold or beneficial interests in federal property that could be subjected to an *ad valorem* tax, no such beneficial use or interest exists in the present case.

b. Petitioners' reliance (Pet. 11) upon *United States* v. *Boyd* is likewise misplaced. *Boyd* involved a compensating use tax imposed upon property brought into and used in the State of Tennessee on which no Tennessee sales or use tax had otherwise been paid. This tax was imposed upon the mere first use of property in Tennessee by a non-exempt person, and it was complementary to Tennessee's sales tax and was computed at the sales tax rates. This tax was not an *ad valorem* property tax but was a tax to compensate for the loss of sales tax on property used in

Tennessee. 378 U.S. at 43. See *United States* v. *Hawkins County*, *supra*; *United States* v. *Anderson County*, 761 F. 2d 1169 (6th Cir.), cert. denied, 474 U.S. 919 (1985). Since the contractor in the present case has no beneficial use of the federal property, however, the tax falls only on federal property and is therefore unconstitutional. See 378 U.S. at 44.

c. Although petitioners assert (Pet. 8-9) that the Nevada Supreme Court's decision in *United States* v. *State ex rel. Beko*, *supra*, conflicts with the decision of the court of appeals, neither the district court nor the court of appeals (including the dissenting judge) found that decision relevant to the disposition of this case. In *Beko*, the United States contended that the tax statute was unconstitutional because it had been applied discriminatorily against the United States and its contractors and because the incidence of the tax fell on the United States. See 493 P.2d at 1327-1331. In the present case, the United States raised the different contention that the tax statute is unconstitutional because it taxes federal property in the hands of a contractor who has no beneficial use, interest, or property rights in the taxed property. Contrary to petitioners' contention, the decision of the court of appeals thus does not conflict with the *Beko* decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

DAVID ENGLISH CARMACK
JOHN J. MC CARTHY
Attorneys

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